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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

CHARLES W. BAKER, ET AL.,
Appellants,

v.

JOE C. CARR, ET AL.,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

REPLY BRIEF FOR APPELLANTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 103

CHARLES W. BAKER, ET AL.,
Appellants,

v.

JOE C. CARR, ET AL.,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

REPLY BRIEF FOR APPELLANTS

Appellants feel that, with the exception noted below, the principal arguments of appellees set out in their brief, received March 17, 1961, have been thoroughly met in the brief for appellants and the brief for the United States as amicus curiae, without need for further elaboration.

Appellees have raised three technical arguments (at pp. 14-20 of their brief) relating to the status of the parties plaintiff and defendant, upon which comment may be useful, since the points may not have been dealt with in the earlier briefs in the form presented.

THE STANDING OF APPELLANTS

The appellees argue that the action is being brought on behalf of all voters in the State of Tennessee, that the proceeding is not, and cannot be, a class action, and that the objective is not the correction of a private wrong (Appellees' brief, pp. 14-16).

Appellees overlook the fact that the action was brought by ten named plaintiffs, residents and voters of five counties (Shelby, Davidson, Hamilton, Knox, Montgomery), and that the complaint states that "they bring this action on their own behalf and on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who are similarly situated." (R 6, and, to like effect, R 12, 16, 18). This is an easily discernible class.

Intervener, Ben West, came in as an individual citizen and voter of one of the five counties, Davidson County (R 103), and additionally on behalf of all the residents of the City of Nashville in Davidson County (R 104). Motions by the cities of Chattanooga and Knoxville to intervene were buttressing actions to indicate that the citizens of these two cities, in the counties of Hamilton and Knox respectively, "are members of the same class of citizens and residents of the State of Tennessee who have been deprived of fair and adequate representation in the General Assembly of the State of Tennessee as the original plaintiffs herein" (R 97). Thus the interventions do not destroy the individual standing of the plaintiffs, but serve to reinforce their allegation that the plaintiffs do, in fact, speak for not only themselves but for a class of similarly situated citizens and voters who have likewise been discriminated against. Such interventions are entirely

in keeping with the role that cities and other public bodies may play in assisting the assertion of the individual rights of their residents, typically in rate hearings, see Re *Engelhard and Sons Co.*, 231 U.S. 647, 651, or for their welfare generally, *Missouri* v. *Illinois*, 180 U.S. 208, 221.

As the District Court below made clear, we are dealing here with the deprivation of voting rights of individuals; and the precedents support vindicating such rights by injunctive relief or by declaratory judgment, or both, at the instance of one or more individuals on behalf of themselves and a larger class. Useful examples are *Terry* v. *Adams*, 345 U.S. 461; *Smiley* v. *Holm*, 285 U.S. 355; *Hawks* v. *Smith* (No. 1), 253 U.S. 221; *Rice* v. *Elmore*, 165 F. 2d 387 (4th Cir. 1947), *cert. denied* 333 U.S. 875. The District Court judgment in *Rice* v. *Elmore*, 72 F. Supp. 516, 528 (DC SC 1947), affirmed as above, granted a declaratory judgment in a class action "that the plaintiff and others similarly situated are entitled to be enrolled and to vote in the primaries. . . ."

The United States, as amicus curiae, supports the standing and personal interest of the appellants in the action and relief sought, saying:

> "The violation of the Fourteenth Amendment asserted by the appellants is a private wrong directly affecting themselves and large numbers of other Tennessee voters," which ". . . cannot logically be treated as a 'public' wrong so as to deprive the victim of standing."
>
> (Amicus brief, filed March 14, 1961, p. 21; and see pages 20-22 inclusive)

THE STATUS OF THE APPELLEES

The appellees argue that this action can not be maintained because of the sovereign immunity against suit of the State of Tennessee (Appellees' brief, pp. 17, 18-20), and because the appellants have named as defendants state officers who do not call or hold the elections for members of the legislature (Appellees' brief, pp. 16-18).

Sovereign Immunity Inapplicable.

The question of sovereign immunity was not raised below by the motion to dismiss (R 46, 47), and we doubt the propriety of this Court considering the contention. *McGrath* v. *Manufacturers Trust Company*, 338 U.S. 241, 249; *DeSylva* v. *Ballentine*, 351 U.S. 570, 582.

Nevertheless, looking at the merits of the contention, Tennessee's argument is that the suit is against officers of the State of Tennessee and as such is thus actually against the State of Tennessee and barred by sovereign immunity. But this question of the interplay between the Eleventh Amendment and rights under the Fourteenth Amendment was settled long ago adversely to Tennessee's argument. A good example is *Ex Parte Young*, 209 U.S. 123, where, drawing on earlier precedents, the Court pointed out that "it is settled doctrine of this Court that a suit against individuals, for the purpose of preventing them as officers of a state, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that [11th] Amendment." 209 U.S. at 154.

The Court went on to hold that:

> "The Act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional." 209 U.S. at 159.

The Court then pointed out that the state has no power to impart to the officials any immunity from responsibility to the supreme authority of the United States. In making the officer of the state a party defendant to a suit to enjoin the enforcement of the alleged unconstitutional act, the Court noted that the fact that the state officer, by virtue of his office, has some connection with the enforcement of the act is the important and material fact. 209 U.S. 157.[1]

In *Sterling* v. *Constantin*, 287 U.S. 378, 393, this Court held that an injunction against a state governor and other officials forbidding enforcement of an unconstitutional statute was not a suit against the state within the provisions of the Eleventh Amendment, saying:

> "[W]here state officials, purporting to act under state authority, invade rights secured by the Fed-

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[1] For cases comparable to *Ex Parte Young*, see *Allen* v. *Baltimore and Ohio R. Co.*, 114 U.S. 311; *Reagan* v. *Farmers Loan and Trust Company*, 154 U.S. 362; *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110.

> **eral Constitution, they are subject to the processes of Federal courts in order that the persons injured may have appropriate relief."**

In *Cooper* v. *Aaron*, 358 U.S. 1, 17, the Court held that "the prohibitions of the Fourteenth Amendment extend to all actions of the State denying equal protection of the laws; whatever the agency of the State taking the action." Thus, the provisions of the Fourteenth Amendment coupled with federal enforcement powers mean that the "agency of the State, or of the officers or agents by whom its powers are exerted," *Ex Parte Virginia*, 100 U.S. 339, 347, who participate in denying to the Tennessee appellants and other voters similarly situated, their rights under the Fourteenth Amendment to an equal vote in state elections, may be enjoined by the federal courts from so doing. This is true regardless of the fact that the appellees act in the name of the State of Tennessee and are clothed with that State's power. "Every State official, high and low, is bound by the Fourteenth Amendment." *United States* v. *Raines*, 362 U.S. 17, 25.

Congress has specifically provided, by action at law, suit in equity, or other proper proceeding, for redress of denials of Fourteenth Amendment rights in Federal District Courts where the denial is under color of state law, 42 U.S.C. 1983, 28 U.S.C. 1343; *Monroe* v. *Pape*, No. 39, Oct. Term, 1960, decided February 20 1961. It is this remedy which appellants pursue.

The Question of Proper Parties Was Correctly Deferred and Is Not Now Before This Court.

Appellees contend that the appellants have failed to join "indispensable" parties to the suit, to wit, the

county commissioners of elections of each of the 95 counties of Tennessee, and that the present appellees have no functions in respect of calling or holding elections for members of the legislature (Appellees' brief, pp. 17-18).

After the complaint was filed the first and only pleading filed by the appellees was a motion to dismiss which, like a demurrer at common law, admits all of the well pleaded facts of the complaint. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 340. The motion to dismiss raised as one of three grounds the question of failure of appellants to include alleged indispensable parties (R 46, 47). This question was specifically deferred by the District Court (R 220). As we point out hereinafter, we believe that the matter is not before the Court on this appeal, that its determination is unnecessary to the appeal, and that the District Court must itself dispose of the matter, at a later stage, before this Court would or should consider it.

With respect to the parties actually made defendants, paragraph IV of the complaint states that the defendant, Joe C. Carr, the Secretary of State, is charged with the duty of furnishing blanks, envelopes, and information slips to the county election officials, certifying the results of elections and maintaining the records thereof, and, together with the Governor and Attorney General, has the duty of examining the election returns received from the county commissioners, and declaring the election results (R 4).

Continuing, defendant George G. McCanless, the Attorney General, is charged with the duty of advising the officers of the State, has the duty, together with the Governor and Secretary of State, of declaring

election results, and, under the Tennessee Code, is a necessary party defendant in any declaratory judgment action where the constitutionality of a statute of Tennessee is attacked (R 4).

Defendant Jerry McDonald is the Co-ordinator of Elections of the State and is charged with the election duties set forth in the 1959 Public Law creating his office (R 4-5).[2]

Defendants Dr. Sam Coward, James Alexander, and Hubert Brooks are the members of the State Board of Elections and have the duty of appointing the election commissioners for all of the counties of the State and "the organizing and supervising of the biennial elections as provided by the Statutes of Tennessee,

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[2] The 1959 Act, Tennessee Code Annotated (1960 Cumulative Supplement) Title 2—Elections, provides:

"2-110. Coordination of elections—Appointment of coordinator.—The secretary of state shall designate or appoint a person in his office to coordinate election activities throughout the state of Tennessee. [Acts 1959, ch 148, § 1.]

"2-111. Duty to interpret questions of law, prepare election laws manual and train officials—Term—Compensation.—The person designated or appointed in 2-110 shall interpret or have interpreted questions of law for the benefit of local or county election officials with a view toward uniformity of election procedures throughout the state. He shall be charged with the duty of keeping up to date the election laws manual heretofore prepared by the secretary of state, and may prepare more condensed handbooks for the use of election officials. He shall review our state election laws, note discrepancies, and conflicts therein and suggest amendments thereto from time to time as the occasion arises. He shall perform such other duties as the secretary of state shall prescribe, and shall serve at the pleasure of the secretary of state and for such compensation as the secretary of state shall determine in keeping with the policies of the staff division of personnel for such or similar positions. [Acts 1959, ch. 148, § 2.]"

Chapter 9, of Title 2 of the Tennessee Code Annotated, § 2-901, et seq." (R 5).

The complaint further alleges that the action is brought against the aforenamed defendants in their representative capacities, and that said election commissioners are sued also "as representatives of all of the county election officials in the State of Tennessee", such persons being so numerous as to make it impracticable to bring them all before the Court; that common relief is sought against all members of said election commissions in their official capacities, it being the duty of the county election commissioners, within their respective jurisdictions, to perform the several enumerated acts concerned with the holding of elections in the counties (R 5).

Thus, for the purposes of this appeal, the appellants have joined as parties defendant all of the officials who apparently have any functions in connection with the calling and holding of elections, and have brought in the alleged missing county election commissioners through the representation of them by the State Board of Elections, in order to avoid an impracticable situation of joining several hundred additional defendants.[3]

Whether or not this joinder of the county officials by representation is sufficient for the purposes of an ultimate decree by the District Court is a matter which will have to be determined by the District Court at the appropriate time, probably with the benefit of a

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[3] The plaintiff City of Knoxville (R 222) in its petition to intervene listed the names and addresses of the three election commissioners of Knox County and requested that the Court make them parties defendant in the cause (R. 258-259). The Court did not reach the issue respecting parties defendant (R 220).

hearing on the merits.[4] If there is a defect, it is curable by amendment.[5] In that posture this Court has said:

> **"Since the defect may be cured by amendment, and nothing is to be gained by sending the case back for that purpose, we shall consider the amendment made, and dispose of the case. *Norton* v. *Larney*, 266 U.S. 511, 515, 516, 69 L. ed. 413, 415, 416, 45 Sup. Ct. Rep. 145; *Howard* v. *De Cordova*, 177 U.S. 609, 614, 44 L. ed. 908, 910, 20 Sup. Ct. Rep. 817."**
>
> *Realty Holding Co.* v. *Donaldson*, 268 U.S. 398, 400.

Because the determination respecting a full complement of parties is subordinate to and not necessary

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[4] Ruling on a motion to dismiss for non-joinder of an indispensable party may be deferred, as was done here, if resolution of the question depends upon facts and circumstances that can better be determined at a hearing on the merits. Barron and Holtzoff, FEDERAL PRACTICE AND PROCEDURE, Sec. 357, Vol. 1A, pp. 390-391; *Reid* v. *Reid*, 269 F. 2d 923 (CA 10, 1959); *Van Kirk* v. *Campbell*, 7 FRD 231 (DC NY 1947). Under Rule 12(b), of the Rules of Civil Procedure, the defense remains until judgment is entered. BARRON AND HOLTZOFF, *supra*, sec. 518, Vol. 2, p. 99.

[5] If it should appear to the District Court that certain parties ought to be added or others dropped, the District Court has ample authority under Rule 15 of the Rules of Civil Procedure to make the necessary amendments. See, for example, *the City of Orangeburg* v. *Southern Railway Company*, 45 F Supp 734 (DC SC 1942), affirmed 134 F 2d 890; *Messelt* v. *Security Storage Co.*, 11 FRD 342 (DC Del 1951); *Brown* v. *Dunbar and Sullivan Dredging Co.*, 189 F 2d 871 (CA 2, 1951); *McGrath* v. *Tadayasu Abo*, 186 F 2d 766 (CA 9, 1951), cert. den. 342 U.S. 832. A complaint will not be dismissed for failure to join an indispensable party where the defect can be cured, *Rosen* v. *Texas Co.*, 161 F Supp 55 (DC NY 1958).

now for the resolution of the larger question before this Court respecting assumption of jurisdiction, and is not a mete subject before this Court at this time, the appellees cannot be heard to debate the election functions of the various defendants in the light of the allegations of appellants admitted by the motion to dismiss. Clearly, in that posture, these defendants are within the stated rule of *Ex Parte Young, supra*, 209 U.S. at 157, that "the state official, by virtue of his office, has some connection with the enforcement of the Act."

Respectfully submitted,

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